



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 46 O. S. }
 { 37 N. S. }

AUGUST, 1898.

No. 8.

THE STUDY OF THE COMMON LAW.*

The law, though some of its rules are of recent date, is in one sense as old as our civilization. For six hundred years lawyers have existed as a separate fraternity and successive generations of able men have devoted themselves to the up-building of legal science. It is but natural that there should be different places where the law can be studied, such as the office of the practicing attorney and the law school, and that differences of opinion should exist as to the advisability of the student spending his time in one or the other. But it is curious, in view of the time during which the law has been pursued as a distinct study, that there should exist radical differences of opinion in regard to the material to be used by the student and the method by which he should handle that material. Yet, as we all know, these are to-day much mooted questions. If lawyers disagree, it is no wonder that the law student is confused. For instance, one asks how he shall study a particular branch of the law, as "Agency." If he is a student in a lawyer's office, he may receive one of two

*Address delivered before the Bar Association of Pennsylvania at Delaware Water Gap, July 7, 1898.

answers. He may be told to read a standard text book on "Agency;" or, possibly, he may be directed to read, in addition to the text book, the cases cited in the Digest of the reports of his own state, or some recent collection of selected cases on "Agency." If he is a student in a law school, the professor may ask him to adopt either one of these methods, or tell him to take notes of lectures. In others words, we have three distinct methods of studying law, viz.: the text book, the lecture, and the case method, besides numerous attempts to combine what are supposed to be the advantages of each. It is my object in this article to compare these three methods with a view to determine which one the student of law should be advised to follow.

It will not be easy for us to examine the subject without prejudice. It is very difficult for one who has studied the case system to examine a student who has confined himself to text books and who has used cases merely as illustrating the correctness of the text. The questions which such an examiner asks are not questions which have occurred to the text book student. On the other hand, one who has acquired his knowledge of law from a study of standard text books, when he examines a student trained in the case system, asks questions for which the student will probably have no direct or concise answer. Each examiner is likely to go away with the idea that there is something radically wrong with the method pursued by the student, when the real difficulty is the failure on his own part to realize that the object of the student's studies has been different from his own. Take an illustration: Ask a student who has read Mr. Bispham's work on "Equity" what is the definition of a trust, and he will reply instantly, "A trust is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another." Ask a student of the case system, say of "Ames's Selected Cases on Trusts," and he may not have a ready answer. He will probably suggest one or two definitions, each of which he will criticise, and wind up by asking whether you mean to confine your question to equitable trusts or to include common law trusts, by which latter he will mean

the relation of principal to factor. The result will be that, if your own legal study has fixed definitions firmly in your mind, you will be by no means favorably impressed. If, on the other hand, you are a product of the study of cases rather than of text books, you will never think of asking for a general definition as a test of a student's knowledge of a subject. You will rather put a hypothetical case and ask a student to reason out a decision.

It will, I believe, help us in our examination if we first look at the way in which each method of studying law has grown up. We shall thus be able to determine whether a particular system is the result of conscious effort on the part of instructors and students to arrive at the best system, or is the result of particular conditions under which the study of the law has been or is pursued. Let us trace for a moment, therefore, the condition under which the law has been studied and taught.

The law school is a modern product. It is true that ever since the days of Blackstone, who may be regarded as the first professor of the common law, there have been, both in England and in America, law lectures. But until the last twenty or thirty years these lectures were regarded as supplemental merely to work in an office. The subjects taught indicate the subordinate position of the law school in the system of legal education. The lecturers either followed Blackstone and gave a view of the entire field of law or they dealt with subjects with which the student would not be apt to come in contact in his preceptor's office. As an example of the first class, we have the lectures of Chancellor Kent. An example of the second class are the lectures of Mr. Justice Wilson before the University of Pennsylvania in 1790. These last were elegant treatises on general jurisprudence embellished with historical allusions, rather than lectures on the common law. Another example of the second class is found in the lectures delivered before the University of Pennsylvania in 1817 by Charles Willing Hare. Mr. Hare covered in a single course natural jurisprudence, or the science of right and wrong, and international law. It is significant that no one at this time thought of lecturing on "Pleading," which was then the fundamental

legal subject and the medium through which most of the common law had to be studied. The reason is not far to seek. The law lectures were not even followed by examinations. The real study was to be done at the office under a preceptor. The law professor was, therefore, obliged to lecture. You must confine yourself to lecturing to a class if you do not expect them to work for you outside of the class room; unless, indeed, you do as Judge Sharswood did, comment on Blackstone, which he could reasonably expect all his students to have read. When the law school began to fill a large place in legal education, as it did after 1860, there was already a long standing tradition in favor of the lecture method. The method itself has now, to a great extent, disappeared, though there still exists among some of our older teachers a strong feeling that it is the only way in which the law can be taught. Among the majority of the Bar, especially among those who were admitted some years ago, the impression still prevails that a law school is a place where members of the Bar deliver more or less set lectures on legal subjects. This impression is heightened by the fact, that even in those schools where the instructors use other methods, from force of old habit the hours are sometimes called "lecture hours." The method is not the result of any thought on the part of the instructor or student as to the best method of imparting instruction. It is simply a product of the conditions which surrounded the early law schools.

The text book method arose from conditions which confronted, not the older generations, but the more recent and the present generation of office students. The office student, except in his attendance on court, was and is limited to the material for legal study offered by the office in which he is registered. This material is to be found in his preceptor's practice and his preceptor's library. In regard to the first, his preceptor's practice, the student's material will differ greatly in both quantity and quality as between office and office. Where the preceptor permits his student to help him in his cases and discusses them with him, the student has the great advantage of seeing, in the raw, the material which makes the

reports. To the extent to which he comes in contact with the real life of the profession, he is enabled to study the principles of law as every active lawyer studies them. He uses cases as his material from which to learn the principles of law; not the reported cases, but the cases made of the facts of his preceptor's client's affairs. The high office rents in our large cities have already banished, except in a few instances, the law students from the lawyer's office. Even in the country the typewriter and the telephone are eliminating his former usefulness, and he is coming less and less in contact with his preceptor's cases. Those who regret the change, I think, regret it not because the law student will not have the use of the lawyer's library—the schools have better libraries—but because the student of law will no longer have a chance to use cases, the real cases of his preceptor's practice, as material on which to build a legal knowledge.

In regard to the second class of material, his preceptor's library, there is a great difference between the modern law office and the law office of the first half of the century. In the early part of the century the text books were few and, with the exception of Blackstone, and later, Kent, consisted mainly of books on "Pleading." The student was, therefore, directed by his preceptor to the reports and it was from these that he obtained his knowledge of legal principles. Down to the forties the reports of our own state were not so numerous but that a diligent student before being admitted could have read and digested every case, besides mastering the chief part of the principal series of English Reports. The Binneys, the Rawles, and the Sergeants of the earlier Bar, and even lawyers as recent as the late Richard C. McMurtrie and George W. Biddle, before being admitted, had made a careful study of the reports of their own state, of the United States, and some of the English Reports most in use. They knew the law from the cases and not from the text books. Soon after the forties, however, the rapid multiplication of reports rendered it impossible for a student to read, let alone master, even the reports of his own state. Again, the numerous statutory changes of the common law made it impossible for him to

know if the case he read was law. He needed a guide to the cases and he had none. At the same time, the text books in his preceptor's office were increasing both in number and importance. By 1850, Story had written separate treatises on many subjects; Wharton had produced his "Criminal Law." From 1850 to well into the last decade scarcely a year passed without witnessing the production of a text book which is still regarded as a standard, such as the works of Theophilus Parsons, of Benjamin, and of Hare. As a result, there was and is still placed within easy access of the office law student a series of clear and, in many instances, elegantly written commentaries on the law extracted from the reports. These text books began to appear just at the time when it was impossible for the student to study the reports. The result was inevitable. The office student from about 1850 abandoned the reports for the text books. This change in the office student's reading was soon reflected in the law schools. While the lecture system down to the eighties continued to be the principal method of instruction, nearly every instructor in connection with his lectures used some text book. Finally, with many instructors, the text book, especially where the instructor himself was the author, took the place of the old lectures. The larger place filled by the law school in the system of legal education rendered this transition possible. The instructor could assign regular lessons and turn his hour into a quiz, rather than a period in which all the information was imparted by himself. To-day, perhaps, the greater part of the legal teaching in the law schools of the country is based on an assignment of so many pages of a text book to be read before the class meets, while the hour with the class consists in an explanation of the difficult part of the text by the instructor and an examination of the different members of the class on the text. Nine-tenths of the students studying in offices at the present time use the text book as their exclusive source of legal information. In spite of its very general use, however, it is clear that the text book method, like the lecture method, had its origin in the condition which at one period surrounded the law student. It is not the product of conscious effort to

find the best method of teaching law. The student in the lawyer's office, in default of assistance to distinguish the cases he should read from the mass of cases he should not read, was forced to the text books, and from the office the text book made its way into the schools.

The case system, using that term in the broadest sense, is the use of cases as the principal material for legal investigation. It is the reading of one or more cases coupled with an attempt to find out the rule of law to be applied to a similar state of facts. It is an inductive system. The cases, the phenomena of legal science, are first examined, then a rule is induced from them. Every lawyer studying a line of authorities bearing on the facts of his own case is using the system. In its narrower sense, the case system is the method of studying law and conducting law classes, first adopted by Professor Langdell of Harvard in 1872. It is based on the conception that the reports should be the chief material of legal study; that the student should see how the law is built up step by step, and induce his principles from a comparison of cases, rather than learn the principle by heart and then attempt to deduce from the principle thus learnt its application to particular facts. The work of the instructor is regarded primarily as that of a guide. He selects and points out from the reports the principal cases on the subject taught. The system was not at first popular. It took more than ten years to become firmly fixed at Harvard. During the last fifteen years, however, it has spread to all the principal law schools in the country. It has, nevertheless, made little, if any, headway in those schools whose students do other things while they study law. Whenever the student devotes only a fraction of his time to his law studies, he naturally wants a method requiring less work outside the class room. Such a student demands during the class hour a great deal of information on a large number of rules of law which he can take down on his notes. He has no time to look up a number of cases and study out whether there are any in conflict or not, or work over the principle of law on which they proceed. We, therefore, never find the case system employed in a night school, or in a down-town

school of New York or Chicago. On the other hand, in the schools connected with such Universities as Cornell, Columbia, the University of Pennsylvania, and the Northwestern University, where all or nearly all the scholars give their entire time to their legal studies, the case system has supplanted, or is rapidly supplanting, the other two methods. The change to the case system on the part of the leading law schools of the country is beginning to be reflected in the lawyer's offices. Many office students now use collections of selected cases on different subjects as the principal material for their legal work. Not a few of our younger lawyers are already products of this system. The proportion seems destined to increase.

The system has this advantage over the lecture or the text book methods; it is not, like them, the product of conditions which prevented for a time any other method being adopted. Its origin, as we have seen, was the result of a conscious effort on the part of an admittedly able man to find the right system on which the common law should be studied. All this, however, does not make the case system necessarily the best system. Before comparing methods with a view of determining which of them we should advise the student to follow, two things are necessary: we must be sure we thoroughly understand each system, and we must come to some agreement in regard to the objects of legal study.

In respect to the lecture system and the text book system, it will be unnecessary to go into any further explanation. Comparatively few have studied under the case system. It is proper, therefore, to explain somewhat more fully how this system is now carried out in the principal schools, and how it may be pursued by the office student. The work of the instructor, as pointed out, is the selection of principal cases on the subject he desires to teach. The principal cases are not always the latest or necessarily the earliest cases. There is usually an effort to select the first case which involved the question to be investigated. If the rule of the earlier case has been modified, the first case in which the change or modification has occurred is also selected. As many more cases are then taken as are considered necessary, in view of the diffi-

culty of the subject, to enable the student who works over them all to obtain a clear idea of the principle, or confusion of principle, on which the courts have proceeded. Some of the best collections of cases published contain references to all the cases in America, England or her Colonies, bearing on the question arising in the case selected for report in full. These notes mark whether the cases cited in them are *contra* or in accord with the principal case. They also give information as to the minor applications or modifications of the rule of law involved. Take, for instance, Professor Ames's "Selected Cases on Trusts." One sub-division is devoted to the question: "Who can be a *Cestui que Trust*?" The first case, naturally, is *Morice v. Bishop of Durham*. The next relates to a trust for keeping up a monument on a grave; the next two, *Gott v. Nairne* and *Brown v. Burdett*, are cases in which there were no *cestui que trust* for a definite term of years. In the first case the trust was upheld; the second, in which the testatrix directed that for twenty-one years the doors and windows of her house should be walled up was declared bad. After these cases follow others where the *cestuis que trustent* were horses, dogs, etc. In the notes all cases similar to those in the text are cited. There is a good deal of incidental information in the notes; as, for instance, in the note to *Mussett v. Bingel*, the "trust for a monument" case. There we find it stated that the trust must not violate the rule against perpetuities. There is also a note of the way in which this restriction was ingeniously evaded in *In re Taylor*, where the testator gave a fund to a charitable organization, with directions to maintain the family vault, if these directions were not complied with, the fund to go to another charity. So much for the selected case book as it ought to be constructed. There are, of course, many miserable selections of cases in existence. In their recommendations a safe rule for Boards of Examiners and others to follow is to confine themselves to selections by well-known teachers of the law, who have long taught under the system.

In regard to the conduct of the class room hour under the system the following points may be noted; before the hour

the student is expected to have read the assigned cases, usually to the number of six or eight, and the notes, if any. The object of the hour is four fold. The first object is to ascertain whether the student understands the point of each case. With beginners this is a matter of great importance, but with the older classes it may almost be assumed that each case is understood, unless there is some real doubt as to the decision owing to the obscure nature of the report. The second object is to discuss with the class the principle or confusion of principles to be gotten out of the cases. The third object is to test the class in their ability to apply the principle or principles to other but similar states of facts. The instructor usually employs for this purpose actual cases to which, however, the class have not been before referred. The fourth object is to discuss the correctness of the decisions as a rule or rules of law. In this connection it is usual to attempt to ascertain whether the rule is an anomaly in the law merely or the application of a more general principle. Suppose the question under discussion is the rule which gives priority to the second assignee of the *cestui que trust* who purchases for value and without notice of the first assignment, provided he is prior in notice to the trustees, even though at the time of the assignment he failed to make inquiry of the trustee as to the existence of prior liens. The class will know that the reason given in support of the rule which prevails in England and many of the states of the United States is that the second assignee, had he inquired of the trustee before purchase, would not have ascertained the existence of a prior assignment. In other words, that the failure on the part of the plaintiff to do something which it was his duty to do, ought not to affect his right to recover when the performance of the omitted duty would not have altered his present condition. The class would be asked what they thought of this as a rule of law. One man would probably suggest that the rule was not applied in torts, because we do not allow a plaintiff in a negligence case to recover where he has been guilty of contributory negligence on the plea that if he had not been negligent he, nevertheless, on account of the negligence of the company,

would have been hurt. Another student would probably suggest that the rule was not applied in contracts, and give as an illustration, the case of an insurance policy on a vessel which provides that the insurance should be avoided if the vessel sail without convoy. *Reid v. Harvey*.¹ If the vessel sails without convoy, but is joined by a convoy, and while with convoy falls into the hands of pirates, the plaintiff being in fault in not sailing with convoy, cannot successfully set up the fact that his fault in not sailing with convoy made no difference in the result. Illustrations *contra* might be suggested, and so the discussion proceeds until the rule of law would not only be thoroughly understood, but each student would have illustrations and arguments which will tend to impress the rule and its reasons firmly on his memory. I may add that the hour, from the point of view of an instructor in the case system, is a success in proportion as he can develop among the members of the class themselves a difference of opinion on a point of real importance. This point may arise either in respect to the principle to be derived from the cases, its application to a particular state of facts, or the correctness of the principle itself, admitting that it is law. The examination consists in hypothetical cases. The effort on the part of the instructor is to state cases which will test the student's knowledge of the principles he has worked out and his ability to handle in argument the cases with which he should be familiar.

There is a great deal of bad teaching under every method. This is, perhaps, especially true of the case system. It takes training and tact to turn the discussion in the class room so that the real points of interest will arise, and to terminate it, without appearing to do so, when enough, but no more than enough, has been said on the subject. To succeed, one must not only be a good lawyer and know his subject thoroughly, but he must have a keen mind and the ability to think rapidly on his feet. In each class he will find among his students men with these abilities; men who know enough law to maintain with ability any position they may take.

¹ 4 Dow's Rep. 97 (1816).

In regard to the object of legal study there are certain points on which we shall all agree. In the first place, it is desirable that the mind of the student should be trained for the work he will be called upon to do as a lawyer. The real question as between methods of legal teaching is, under which method is the student trained for his life work? The practicing lawyer, the legal writer, the judge spend, or are supposed to spend, their lives on legal problems. The legal training, therefore, which the student gets, should enable him to deal with legal problems in the way in which a lawyer must deal with them. When we understand the nature of the mental operations necessary to solve legal problems, we will know the mental training which the law student should have. What are then the operations of the mind through which the lawyer must go?

When a client comes to a lawyer's office he does not put him through an examination in definitions. No client ever yet, in the course of his business, asked a lawyer to define a hereditament, or a tort, or any other legal term. The client brings facts, not questions of definition, to his lawyer. The side of the problem which comes first to the lawyer, therefore, is the facts of his client's case. The facts are the first material on which his mind must work. The second material with which the lawyer must deal is the reported decisions on facts similar, but not perhaps identical. True, he may remember a principle which he believes will govern the case, but it is with the reported decisions that he must deal. Both the practicing lawyer and the judge must ask themselves, what has been done when similar cases have arisen in the past? And though consciously or unconsciously both are always influenced by the existing sentiment in the community in respect to right and wrong and public policy both, in the main, from many individual instances recorded in the reports, induce the rules of law applicable to the facts of the case which they must argue or decide. Thus the law is pre-eminently an inductive science. It never was, and is not now, a fixed body of principles, each logically consistent with the other. It was not created by metaphysicians or philosophers, but by men who were called

on to decide actual controversies. Principles did not exist before cases ; the cases were first. What we call the principle or rule is an induction from particular instances more or less numerous. This is not only true of the past but is true of the present. A case is before a lawyer or a court. The mental process is not : " Here is a legal principle ; there are the facts ; we will apply the principle to the facts." Such a method can be employed only where there is not any real question in dispute. If a " legal question " really exists, the mental process must be : " Here are the facts in this case ; this the point in issue ; here are a number of reported cases ; this is the principle to be obtained from them ; the principle is sound ; its application to this case would result in such a decision." First, the induction from the cases ; then the deduction or application of the rule. The first object of legal study is to so train the mind of the student that he will easily and naturally go through these mental processes. Legal information, of course, he must have, but until his mind is trained as indicated, he is not a lawyer.

Turning to the different methods of legal study now in use, we may now ask ourselves which one comes the nearest to giving the law student the training which we have indicated is required. Let us take each method up separately and examine it ; and first, as to that which is in most general use, viz. : the text book method. The student of a standard text book obtains a clear idea of the extent of the subject and, concerning its intent, he can describe its several parts. For instance, if it is a book on trusts, he cannot only define a trust, but the several kinds of trusts. Furthermore, he will know several rules, which will be labelled under several heads, as for instance, under the head, " Creation of Express Trusts," he will know that there must be words indicative of an intention to create a trust, or even further, that there must be a definite subject and a definite object. If the text book used is a good one, and his study careful, he may go yet further and have for each clause in his rules an illustration taken from a reported case, and he may know the name of the case. If the text book is a critical one, he may know the argument given in

the book for or against a particular rule of law. All this is useful, even necessary to the making of a lawyer; but the question is, does it make a lawyer? Is there not a fundamental defect? There is no training of the mind in the inductive processes, and, as we have seen, the induction from the reported cases is, after the comprehension of the point in issue, the first step in any serious legal reasoning.

It is recognized in all other scientific teaching that the student to become a master of the science must examine the facts for himself and learn how to make his own inductions; that is, to draw his own conclusions from observed facts. Why should law be an exception to this rule? One can gain a general idea of physiology by reading works on this subject, but the doctor does not pretend he knows the structure of the human body until he has himself worked over the cadaver. Biology, chemistry, physics can be "read up," but the principal part of the modern school of biology, of chemistry, or of physics is the laboratory, and more and more the books used in these sciences are records of experiments rather than, *a priori*, statements of supposed laws. He who would know chemistry must, himself, make the simple and then the more complicated experiments. He must see how the masters discovered the laws and with them, as it were, rediscovered them. Is this not so, also, of the common law? He who would really understand must put himself into the spirit of its growth. He must put himself into the position of the judge who first enunciated the rule, with the concrete facts of the case before him. He need not read every case, but should he not read each case which has really developed or modified the rule?

It is said on behalf of the text book system, that it is a waste of time to ask the student to read cases and himself gather the rules of law from them, when this work has already been done by a skilled legal writer. "What," it is asked, "is the use of reading early cases in sales, and, perhaps, misunderstanding the rules of law, when Benjamin's book is in existence? A student can master all there is in such a book in a couple of months, but it will take him a much longer time to read a sufficient number of cases to draw his own conclusions."

This argument would, of course, be unanswerable if the object of legal study is to give the student a general knowledge of the law necessary to the education of a gentleman. But if the object is to produce lawyers who can handle cases and legal problems as they arise, the mere fact that one method involves less time and work is no argument in its favor if it does not fully accomplish the end in view. We have no right to point out to students a "royal road" if it does not bring them to where they want to be. Again, it is said by those who advocate the text book method that a thorough text book contains all the applications and modifications of the legal rules in the subject treated of, while to read all the cases would be impossible, the implication being that one can teach all these rules from a text book but not from cases. But is not this argument a misuse of the word "teach"? It is true that a text book may contain an account of every modification of every legal rule involved in the subject, but it does not follow that the human brain can remember, much less digest, this mass. A man can "cram" up for an examination nearly all the information in a text book. He can do this, if trained at the work, in a marvellously short space of time. I know a man who prepared for the Bar examination in Philadelphia which, at the time, from the standpoint of text book students, was not easy, in three months, and passed so well that he was complimented by the members of the Board. Imagine this man taking that examination three months after, if he did not look at a book in the meantime!

Turning to the lecture method, we find that it accomplishes the same general results as the text book method. A number of legal rules and illustrations of their application are fixed more or less definitely in the mind of the student. The method itself is necessarily confined to a law school. It has many mechanical defects from which the text book method is free. The average man, I believe, takes in what he reads with care better than what he hears, be he ever so attentive. There are, of course, exceptions to this rule. The typewritten notes of lectures, procurable in all law schools using the method, are not as good as the text books, being much more liable to

error. As a consequence of these manifest defects, the set law lecture is now becoming a thing of the past. Where there is in existence a good text book on the subject to be taught there seems to be no excuse for the formal lecture. Those of you who, like myself, first studied law under this plan can doubtless remember with great pleasure a particular course of lectures and recognize that from that course considerable benefit was derived. But having questioned a large number of persons who attended during their law school days the old fashioned law lectures, I find that the usual testimony tallies with my own experience. I derived information from reading the typewritten notes which I bought from the stenographer hired by the class. The only benefit derived from attending the lecture itself grew out of the fact that often a question from a student would cause the professor to put down his manuscript and enter into what may be described as a legal chat, in which the personalty of the lecturer impressed what he said on my memory. In short, the only real benefit of attending a law lecture, a copy of which you can buy, is the fact that the professor does not always lecture throughout the entire hour. When he stops lecturing and becomes interesting, the class wake up and derive some benefit.

I do not for a moment assert that a great deal of legal information cannot be obtained from lectures or text books; neither do I wish to give you the impression that I do not approve of the use of text books, or regard attendance at a law school lecture as always a waste of time. What I object to is regarding one or the other, or both, as the chief material which one must use to become a lawyer. I deny that legal power or grasp which consists in the ability to see the point in dispute and argue for a particular decision by analogy to recorded cases, can be obtained by the student if his principal reliance is on text books or on lectures. It is true that many who are now able lawyers, during their school days used nothing but text books or lectures, reading cases only as illustrations of how much the lecturer or text book writer knew. But will any one of these say that he was a lawyer in any real sense of that word, when he graduated? I have heard many such

assert that they never knew the law until they began to practice it. This assertion means nothing more than that they never knew the law until they began to study it from cases.

We repeat our question, does either the text book or the law lecture train the student for the work of the lawyer? If I am correct in my description of a lawyer's work and the mental process which it is necessary for him to go through in that work, we must reply in the negative.

In respect to the case system, the first thing that impresses us in its favor is the fact that it turns the student at once to what we all admit is the real source of the law, that is, the cases. As a consequence, he from the first must go through the mental process of induction, thereby supplying the great defect of the other methods. As used in the law schools, it has the further advantage of training the student to argue about cases, and this again is what he must do as a lawyer. Reproducing, as nearly as may be, the work which must be done by the practitioner and the judge, it is in accord with the modern methods used in other applied sciences. As a system, it is based on a well-known law of the human mind, which is, that to be able to apply a rule to new facts, or even to understand a rule which is the outgrowth of a multitude of individual instances, we must study the instances first and arrive at the law by the process of induction. We have no reason to assume that the rules of the common law are any exception, or that the minds of legal students are built on a different pattern than those of the students of any other applied science. Again, a student of the system working for an examination on hypothetical cases is not able to "cram" the subject. One can study up over night a host of definitions and many pages of text, but no one can prepare himself to intelligently argue in a lawyer-like fashion the proper decisions to be made in hypothetical cases, the facts of which, though similar to cases he may read, will not be exactly the same.

It is said by the critics of the method that it must tend to produce mere "case lawyers—slaves to precedent." This criticism arises out of a misconception of the method itself, due to its rather unfortunate name, "case method." From

the description given, you will not be surprised to learn that the result is the exact opposite from that feared. As has been pointed out, an hour with a class under the system is a discussion of cases, not an attempt to reconcile cases which really conflict. The student is urged to examine critically the reasons given for their decisions by the greatest judges. Often the majority of the class will be found differing, not only from the professor, but from Lord Mansfield or Lord Eldon; Chief Justice Marshall or Judge Sharswood. Instead of producing "case lawyers—slaves to precedent," I should say that the chief difficulty and danger of the system is that the student is apt to become so interested in what he believes ought to be the law on a particular point that he cannot appreciate that the authorities are so much against him that a court would not listen to his argument, though his instructor may.

After all, the best argument in favor of any system is the practical result. The result of the earlier study of the reports in the lawyer's office is well known. The great era in our own Bar is the era of men who studied primarily the reports. The present period, in which we must admit that there is a painful paucity of men who are destined to make any lasting impression on the law, is one in which the lawyer has been trained at first, at least, by the text books and by lectures. What the result in the production of great lawyers will be of the revival of the inductive method of acquiring knowledge of legal principles we have not as yet had time to know. The products of this revival are the younger members of the Bar. But this much those of us who come in contact with the law student and young lawyer can testify. The young men trained in this method are impressing themselves, in spite of some natural prejudice against them, on the members of the Bench and older members of the Bar. The principal places in the great law offices of the larger cities of the country are taken by the graduates of the schools who are now using this method. As among the students themselves, the best men as a rule are satisfied with their own progress under the system, recognizing that their progress under the system is greater than where the text books or lectures are used, while the

amount of live interest in legal problems is perceptibly on the increase. Again, we who employ this method in our own teaching work, have little fear that our graduates will fail to pass examinations set by others, for if they pass our examinations, which are based on hypothetical cases, it is because they know the subject, not merely a particular text book or set of lectures.

In conclusion, I want to express one additional thought. I cannot expect, neither do I want, that all who read should agree with me as to the principal material to be used by the law student, the way in which he should handle his material, and the work of the legal instructor. There is no condition so unfortunate as unanimous agreement regarding the "best way" in any subject. Legal study is no exception to this rule. Personally, I shall be more than satisfied if I have led any to see, in regard to the "study of the common law," that there is a real problem to solve, and a problem of great importance to the future of the Bar, and, therefore, one in which not only the teacher of law but all the members of our fraternity should take an active and intelligent interest.

William Draper Lewis.

University of Pennsylvania,
Department of Law.